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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

13 ANDRE ROSOWSKY, Derivatively and) CASE NO.: 8:17-CV-00698
14 on Behalf of CAPSTONE TURBINE) (Orange County Superior Court
15 CORP.,) Case No. 30-2016-00894859-CU-
16 Plaintiff,) MC-CJC)
17 vs.)
18 DARREN R. JAMISON, NOAM)
19 LOTAN, GARY J. MAYO, GARY D.)
20 SIMON, ELIOT G. PROTSCHE,)
21 HOLLY A. VAN DEURSEN,)
22 DARRELL J. WILK, RICHARD K.)
23 ATKINSON, JOHN V. JAGGERS,)
24 JAYME L. BROOKS, and EDWARD I.)
REICH,)
Defendants.)
and)
CAPSTONE TURBINE CORP.,)
Nominal Defendant.)
NOTICE OF REMOVAL OF
ACTION TO THE UNITED
STATES DISTRICT COURT
FOR THE CENTRAL
DISTRICT OF CALIFORNIA
UNDER § 1441(B)
(DIVERSITY)

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 CENTRAL DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441(a) and
4 (b), and 1446, Defendant Holly A. Van Deursen, by and through her undersigned
5 counsel, hereby removes to this Court the state court action described below:

6 1. On December 27, 2016, Plaintiff Andre Rosowsky (“Plaintiff”) filed a
7 Shareholder Derivative Complaint for Breach of Fiduciary Duty and Unjust
8 Enrichment in the Superior Court of California for Orange County (the “Superior
9 Court”), captioned *Rosowsky v. Jamison, et al.*, Case No. 30-2016-00894859-CU-
10 MC-CJC. A copy of the state court complaint (the “Complaint”) is attached as
11 Exhibit (“Ex.”) A. The Complaint is a shareholder derivative action purportedly
12 brought on behalf of Capstone Turbine Corporation (“Capstone” or “the
13 Company”), and seeks monetary damages from the individual defendants on behalf
14 of Capstone, among other relief.

15 2. As of the date of removal, none of the defendants have been served
16 with the Complaint, a summons, or any other process, pleadings, or orders in the
17 state court action.

18 3. Pursuant to 28 U.S.C. § 1446(a), all “process, pleadings, and orders”
19 served upon defendants shall be attached to the notice of removal. Because no
20 defendants have been served, no process, pleadings, or papers need be attached.

21 **DIVERSITY JURISDICTION**

22 4. This is a civil action of which this Court has original jurisdiction
23 under 28 U.S.C. § 1332, and is one which may be removed to this Court by Ms.
24 Van Deursen pursuant to the provisions of 28 U.S.C. § 1441(b), in that it is a civil
25 action wherein the amount in controversy exceeds the sum of \$75,000, exclusive of
26 interest and costs, and is between citizens of different states.

27 5. Plaintiff’s Complaint does not specify the dollar amount of damages
28 sought. This fact does not deprive this Court of jurisdiction. If it is apparent from

1 the facts alleged in the complaint, which are assumed to be true for purposes of this
 2 analysis, that the estimated amount in controversy exceeds the jurisdictional
 3 requirement, the Court may take jurisdiction. *See Singer v. State Farm Mut. Auto.*
 4 *Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (“The district court may consider
 5 whether it is ‘facially apparent’ from the complaint that the jurisdictional amount is
 6 in controversy.”). Here, the Complaint alleges that the defendants are responsible
 7 for harm caused to Capstone as a result of Capstone’s business dealings with a
 8 Russian distributor, certain false and misleading statements made by Capstone, and
 9 the failure to implement adequate internal controls in connection with Capstone’s
 10 financial reporting. Ex. A ¶¶ 7, 9, 10. The Complaint alleges numerous drops in
 11 Capstone’s stock as a result of the individual defendants’ purported breaches of
 12 their fiduciary duties. *See id.* ¶¶ 13 (alleging a 15% drop in Capstone stock price
 13 on August 8, 2014), 16 (alleging a 16% drop in stock price), 18 (“[Capstone’s]
 14 stock closed at \$4.00 per share and continued to decline rapidly.”). The Complaint
 15 also alleges that the individual defendants have exposed Capstone to liability under
 16 federal securities laws, that the Company has been “substantially damaged,” and
 17 that as a direct result of the individual defendants’ conduct, “Capstone will lose
 18 and expend many millions of dollars.” *Id.* ¶¶ 20-21, 110. In addition, the
 19 Complaint alleges that the individual defendants were over-compensated by the
 20 Company. *Id.* ¶ 113. The Complaint alleges that the individual defendants are
 21 responsible for all these alleged harms, and seeks an order requiring the individual
 22 defendants to pay these damages to Capstone. *Id.*, Prayer for Relief. These
 23 allegations reflect that the amount in controversy exceeds \$75,000, exclusive of
 24 interest and costs.

25 6. Complete diversity of citizenship exists. The Complaint does not
 26 identify Plaintiff’s citizenship. Defendant is informed and believes that Plaintiff is
 27 a citizen of Massachusetts. *See Declaration of Joni Ostler filed concurrently*
 28 *herewith (“Ostler Decl.”)* ¶ 2. No defendant is a citizen of Massachusetts. *Id.* ¶ 3.

1 Removal under diversity of citizenship is proper because no defendant who has
2 been “properly joined *and served*” is a citizen of California. 28 U.S.C. § 1446(b)
3 (emphasis added); *Regal Stone Ltd. v. Longs Drug Stores Cal.*, L.L.C., 881 F.
4 Supp. 2d 1123, 1128-29 (N.D. Cal. 2012) (holding that Court had diversity
5 removal jurisdiction notwithstanding the presence of an unserved California citizen
6 defendant); *Carreon v. Alza Corp.*, No. C 09-5623 RS, 2010 WL 539392, at *1-2
7 (N.D. Cal. Feb. 9, 2010) (same).

TIMELINESS OF REMOVAL

9 7. Removal is timely pursuant to 28 U.S.C. § 1446(b). No defendant has
10 been served. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344,
11 347-48 (1999) (holding that 30-day deadline to remove does not begin until
12 defendant is served by “formal process”); *Regal Stone*, 881 F. Supp. 2d at 1128
13 (holding that defendant may properly remove before being served, and rejecting
14 plaintiff’s argument that such removal was premature). Further, because there are
15 no defendants who have been “properly . . . served in the action,” there are no
16 defendants whose consent or concurrence in this removal is necessary. *See*
17 *Destfino v. Reiswig*, 630 F.3d 952, 956-57 (9th Cir. 2011) (holding removal notice
18 effective although not all defendants joined, because non-joining defendants had
19 not been served (alteration in original) (citation omitted)).

VENUE

21 8. Pursuant to 28 U.S.C. § 1441(a), “[e]xcept as otherwise expressly
22 provided by Act of Congress, any civil action brought in a State court of which the
23 district courts of the United States have original jurisdiction, may be removed by
24 the defendant or the defendants, to the district court of the United States for the
25 district and division embracing the place where such action is pending.” The
26 Superior Court is located within the Southern Division of this District.
27 Accordingly, venue in this Court is proper under 28 U.S.C. § 1441(a).

SERVICE AND FILING OF NOTICES

2 9. Pursuant to 28 U.S.C. § 1446(d), Ms. Van Deursen will promptly
3 serve a copy of this Notice on counsel for Plaintiff and will file a copy of this
4 Notice with the Superior Court.

5 10. Accordingly, Ms. Van Deursen prays that this action be removed from
6 the Superior Court to this Court.

8 || Dated: April 14, 2017

**WILSON SONSINI GOODRICH & ROSATI
Professional Corporation**

By: /s/ Nina F. Locker
Nina F. Locker

Attorneys for Defendant Holly A. Van Deursen